(25)

No. 06-427

In The Supreme Court of the United States

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION,
Petitioner,

v.

BRENTWOOD ACADEMY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, as stated in the Tennessee Secondary School Athletic Association's (TSSAA) Petition for Certiorari at 27-29, this Court should overrule its previous decision in this case that held (a) that TSSAA's sanctions against Brentwood Academy (BA), an independent school member of TSSAA, for pure non-commercial speech arose from a "regulatory enforcement proceeding", 531 U.S. 288, 293 (2001), and (b) that such TSSAA "regulatory activity ... should be treated as state action ...."? *Id.* at 291.

2. If the answer to Question One is no, whether, under longstanding First Amendment principles traditionally applied in a regulatory setting, TSSAA carried its burden of justifying its punishment of BA's pure non-commercial speech under the time, place, and manner doctrine (a) when the penalized speech is "harmless informational speech about a permitted athletic practice," 304 F. Supp.2d 981, 995; is "consistent with ... TSSAA's legitimate governmental interests," *id.*; "caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests," *id.*; was addressed to "all the parents of all the male students who had applied, been tested and admitted, and signed enrollment contracts, students who had already decided to attend [BA]," *id.*; and was directed at "post-recruitment activity," *id.* at 996; and (b) when the basis of the enforcement action relies on the content of the speech; and depends on the discretionary and standardless judgment of the TSSAA and its Executive Director?

3. If the answer to Question One is no, whether TSSAA violated BA's procedural due process rights by (a) failing to inform BA of important evidence it relied on in sanctioning BA (actually misleading BA on the relevance of the evidence in question as the District Court found, *id.* at 1004 n.29), and (b) by failing to give BA an opportunity to respond timely to that evidence?

4. If the answer to Question One is yes, in whole or in part, what standards, if any, under the First Amendment and under procedural due process are appropriate to review the conduct of TSSAA and whether TSSAA has satisfied those standards?

RULE 29.6 STATEMENT

Respondent BA does not have a parent corporation, and no publicly-held company owns 10% or more of BA's capital stock.

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STATEMENT OF THE CASE

Some Preliminaries

1. TSSAA threatens its member school Brentwood Academy (BA), as an independent school, with expulsion (TSSAA calls this "exclusion") if BA remains successful in securing First Amendment protection against TSSAA's regulatory discipline. Pet. 14, 30.[1] TSSAA asserts that "[o]n a practical level…[t]he real issue" is whether TSSAA and all similar regulatory bodies will continue to exercise regulatory authority over private schools. Not leaving the answer to the imagination, TSSAA avers that "[i]f allowed to stand, the Sixth Circuit's analysis will inevitably lead to the exclusion of private schools from associations like TSSAA." *Id.* at 14.

This Court should not allow such improper, heavy-handed threats of retaliation – probably illegal in their own right – to influence its review-granting process. When this case was last here, 531 U.S. 288 (2001), this Court held that TSSAA's "regulatory activity," exercised "in lieu of the State Board of Education's exercise of its own authority," was state action, subject to constitutional scrutiny. *Id.* at 291. TSSAA proffered a Chicken Little scenario analogous to its threat of retaliation herein – that a finding that TSSAA was a state actor "will somehow trigger an epidemic of unprecedented federal litigation." *Id.* at 304. This Court rejected that claim, noting "no evident wave of litigation," *id.*, even though every other jurisdiction to have addressed the state action issue (going back to 1968) had found similar regulatory bodies to be state actors subject to constitutional

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[1] "Pet." citations refer to TSSAA's Certiorari Petition. "Tr." citations refer to the trial transcript. "CAJA" refers to the joint appendix filed in the Sixth Circuit in this appeal. "JA" refers to the joint appendix filed in the Sixth Circuit in the first appeal. "BIO" refers to TSSAA's Brief in Opposition to Certiorari in No. 01-1117. "Apx." refers to the Appendix herein.

scrutiny of their "regulatory activity." *Id.* at 291, 294 n.1. It should reject TSSAA's analogous threat herein.[2]

2. TSSAA's Petition asserts that BA "committed several ... intentional violations of the recruiting rule [RR]." Pet. 2. This is incorrect. BA's Headmaster Curtis Masters testified that "[f]rom the very beginning ... [BA's] intent was to abide by the recruiting rule to the letter."[3] Tr. 2226-27; 304 F. Supp.2d 981, 992.

Ronnie Carter, TSSAA Executive Director, has conceded that BA had no intent to violate RR. CAJA 1830, 1848. The parties so stipulated. CAJA 126 (¶40); 63 (¶91)

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[2] There is, unfortunately, precedent for TSSAA's threat of retaliation. TSSAA plays hardball. In *Crocker v. TSSAA*, 1990 U.S. App. LEXIS 12511 (6th Cir. 1990), the District Court enjoined TSSAA from imposing sanctions against a public high school for allowing Crocker to play interscholastic sports. After the injunction was dissolved on appeal, TSSAA immediately ruled that the school for which Crocker played "must forfeit all ... games in which Crocker had played" under the District Court's protective order. The Sixth Circuit overturned TSSAA's vindictive, retaliatory forfeiture action: "It would be unfair to penalize McGavock High School for actions that it took in compliance with a District Court order during the pendency of that order." *Id.* TSSAA's vindictive threat of retaliation is not a proper basis for granting Certiorari.

[3] Throughout this litigation, BA has supported a recruiting rule "that prevents inappropriate conduct" but that "allows the school to tell its story." Tr. 2228. Government can limit conduct to prevent "harmful behavior" in ways it cannot limit speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 579 (1995). This distinction between conduct and speech is one that TSSAA has steadfastly refused to recognize. At trial, no TSSAA expert witness drew a distinction between speech and conduct, condemning a monolithic, undifferentiated abstraction – athletic recruiting. *See, e.g.*, testimony of Dr. Sharon Stoll, who did not understand the difference between speech and conduct, since both can influence students: "I don't understand. Is there a difference between speech and conduct? ... I really don't understand... I don't see a difference." CAJA 1768-69. See also the testimony of Dr. George Sage, who also drew no distinction between speech and conduct, opining that "speech is a form of conduct." CAJA 1690.

("The TSSAA admits that Coach Flatt had no intention of violating the Recruiting Rule by mailing the Spring Practice Letters and making the telephone calls"). The District Court found that BA had no "scienter" to violate RR, 304 F. Supp.2d at 992 & n.5, 1002.[4]

3. TSSAA asserts that "many private schools in Tennessee join other athletic associations with different values and different rules." Pet. 2, 15. TSSAA does not point to any factual findings of the District Court to support this factual assertion, and there are none. The only District Court finding is to the contrary. In rejecting the assertion that BA "should either leave the TSSAA or change the TSSAA rules," the District Court stated that "TSSAA is effectively the only game in town." *Id.* at 997. In 2001, this Court noted that "[n]o school is forced to join" TSSAA, "but without any other authority actually regulating interscholastic athletics," nearly all high schools with athletic programs accept TSSAA's regulatory authority. 531 U.S. at 291.

TSSAA cites testimony by Carter to support its position. That testimony was not adopted by the District Court, and it is easy to see why. Carter asserted that there was a high school sports regulatory entity "in Chattanooga," but he was "not sure of the name." CAJA 868. Carter testified that a few independent schools had left TSSAA, but he could not "remember the year." *Id.* at 869. No evidence

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[4] TSSAA has been factual-accuracy challenged before in this case. The District Court characterized statements by and affidavits on behalf of TSSAA as being "disingenuous, at best" and "utterly false." 13 F. Supp.2d at 681, 685. To rebut the assertion that all public schools in Tennessee were members of TSSAA, Carter filed an affidavit listing public schools that were not TSSAA members. JA 214-16. Upon investigation, it turned out that all public high schools that have interscholastic athletic teams were TSSAA members. The schools listed in the Carter affidavit did not have interscholastic sports programs. Rather, they included "alternative" or special education schools (*e.g.*, for the physically disabled). JA 217-18.

in the record and no findings support TSSAA's assertion that viable regulatory alternatives to TSSAA exist for BA or other similar schools. *See* note 4, *supra*.

4. Subsequent proceedings in this matter remain in the District Court. BA's equal protection claim "has not been addressed by the Court of Appeals because the claim was added by Amended Complaint after this case was remanded to [the District] Court" in 2001. 304 F. Supp.2d at 1008. That claim raises both facial and as applied challenges to TSSAA's RR, which the District Court in its discretion declined to adjudicate in 2003. So, any decision by this Court on the merits would be subject to further litigation on the very same factual matters (under a different legal theory).

Similarly, since the Court of Appeals reinstated BA's antitrust claims, further proceedings on those issues still remain. 442 F.3d 410, 440-44. While those claims are analytically distinct, their ultimate resolution could have a significant effect on how TSSAA is organized and structured in performing its regulatory functions.

That further proceedings are still contemplated in the District Court does not deprive this Court of jurisdiction, "[b]ut in the absence of some ... unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari." ROBERT L. STERN, et al., SUPREME COURT PRACTICE 260 (8th ed. 2002).

5. No Sixth Circuit judge "requested a vote on the suggestion for rehearing en banc." Pet. Apx. 154a. Thus, Judge Rogers, who dissented from the panel decision and from the denial of panel rehearing, declined to recommend or vote for rehearing *en banc*. This strongly suggests that, even though he disagreed with the panel majority's decision, Judge Rogers believed that further appellate review beyond the panel was not appropriate or otherwise indicated.

Judge Rogers' view on *en banc* rehearing should counsel against Certiorari here. When this Court took this case in October Term 2000, there was a strong dissent urging

en banc reconsideration and noting creation of a circuit split on the very issue decided. 531 U.S. at 294. Neither of those factors is present herein.

6. TSSAA's analytical approach in this matter has been an opportunistic moving target. At summary judgment, the issue was whether RR and its application constituted content-based or content-neutral regulation. TSSAA asserted that RR was content-neutral – a "valid time, place and manner [TPM] restriction." The District Court rejected this defense: The RR "ban is content-based because the interests asserted by the Defendants to support the ban focus on the content of the message and the effect of the message on the listener." 13 F. Supp.2d at 687-88.

The Sixth Circuit found RR to be a "content-neutral regulation" subject to "reasonable [TPM] restrictions." The Sixth Circuit accepted TSSAA's analytical framework – TPM analysis with intermediate scrutiny rather than the strict scrutiny applied by the District Court. 262 F.3d at 553-54.

BA unsuccessfully sought Certiorari. No. 01-1117. TSSAA contended that RR was a content-neutral regulation that "must ... be viewed as a reasonable restriction on the time and manner of [BA's] solicitation of minors." BIO 15.

At trial, TSSAA could not sustain its content-neutrality claim. The District Court found that "the preponderance of the credible evidence at trial is that the substantive 'content' of the Spring Practice Letter and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule. The TSSAA penalized [BA] for the substantive 'content' of the Spring Practice Letter and calls and the message they conveyed in this case." 304 F. Supp.2d at 991 n.4. Thus, TSSAA was unable to sustain its TPM defense, which it used to win reversal in the 2001 appeal and to resist review in this Court in No. 01-1117. TSSAA effectively abandoned its TPM

claim on appeal after trial and is now seeking review in this Court on an altogether different theory.

This is potentially very prejudicial to BA. The broad "public concern" solicitation issues raised in the context of BA's facial challenge, *see* 13 F. Supp.2d at 688-90, have been removed from the case as a result of the Sixth Circuit's 2001 decision, which narrowed the issues to an as applied First Amendment challenge. 262 F.3d at 555-56, 558.

7. To the extent that TSSAA seeks review on the application of TPM doctrine, Pet. 18-20, the Court should be aware of a problem in the record confronting TSSAA.

Interrogatory 47 put the following question to TSSAA: "Does TSSAA contend that the recruiting rule is 'narrowly tailored' to serve the governmental interests described in your response to the foregoing interrogatory number one? If so, explain in detail the factual support for any such contention." This was TSSAA's response, in relevant part: "TSSAA does not contend that the recruiting rule as applied is narrowly tailored to serve the governmental interests it furthers." Without objection, this Interrogatory and response were read into and were admitted as part of the record at trial. Tr. 2301-02.

Several days later, TSSAA asserted that its response to Interrogatory 47 was the result of a "clerical error" and sought to supplement its answer to Interrogatory 47. BA timely objected on the ground that TSSAA did not supplement its response in a timely manner under the local rules, which require TSSAA to review discovery responses and correct them before trial. Local Rule 9 provides that answers to interrogatories may be supplemented no later than 30 days before trial. BA had "great difficulty accepting the idea that this is merely a clerical error." During a discovery dispute, TSSAA "had at least three opportunities to go back through their answers and to check to make sure everything was like it ought to be." The answer read into the record was "consistent with the proof" at trial, Tr. 2736, and,

syntactically, it is hard to credit the "clerical error" claim when the answer is as follows: "TSSAA does not contend that the recruiting rule as applied is narrowly tailored ...."

Applying Local Rule 9, the District Court rejected TSSAA's attempt to supplement its answer to Interrogatory 47. It accepted TSSAA's submission as an offer of proof that there was a clerical error, but the record only contains TSSAA's actual answer to Interrogatory 47. Tr. 2738. The evidentiary matter has not been preserved on appeal by TSSAA. Since the record shows TSSAA's acknowledgment that it cannot meet the TPM standard, and the facts (as found by the District Court and affirmed by the Sixth Circuit) are consistent with that acknowledgment, this record provides a questionable vehicle for this Court to review the application of the TPM doctrine to the circumstances of this case.

The Factual Context

In 1995, BA defeated Riverdale, a public high school and traditional football powerhouse located in Murfreesboro, for a football championship. Hulon Watson, Riverdale's principal, acknowledged that he was "quite upset with the loss;" the "Murfreesboro community [was] behind the Riverdale team that year as they pursued the game;" and there was a "big crowd at the game." CAJA 1802-03. A "winning team and a state championship brings a sense of pride to the community and the school that cannot be described." CAJA 1806.

This sense of community pride in winning a statewide athletic championship and its attendant protectionism are recurrent themes. When asked about the purpose of RR, TSSAA Board of Control member Morris Rogers was not subtle. The purpose is "obvious." It is "really for protection of schools and coaches," by "[k]eep[ing] them from losing their best players." CAJA 1628-29.

Jack Roberts of Michigan's TSSAA counterpart asserted that "[t]he sports events of our high schools are a source of pride.... [C]ommunities take a lot of pride in their sports teams," can "develop[] a sense of ownership of these children" (considering them "our kids"), and "can develop resentment" if, "for academic or athletic reasons," students choose to attend an independent school, "[e]specially if they are really good athletes." CAJA 1620-21.

Scott Brunette, Nashville public schools athletic director, and Michael Hammond, TSSAA Board of Control member, testified that public school officials and coaches see students zoned to their schools as "our kids," and "complain about private schools ... beating us with our own kids" or "taking their students." CAJA 1298, 642-43.

Shortly after Riverdale's loss to BA, Watson convened a "split" meeting of about 25 schools for the purpose of proposing "to separate private and public schools ... [a]s far as athletic competition is concerned." CAJA 1803. The deep hurt Watson felt for his school, because of its defeat in a football game, would be remedied by ensuring that Riverdale would not face BA in a championship again.

Watson believed that it was an "injustice" that private schools won more state championships than their percentage of TSSAA membership warranted. CAJA 1812. BA had a "great coaching staff in football," and "good coaches ... can attract higher quality athletes." CAJA 1821.

In convening the "split" meeting, Watson "absolutely" did not notify TSSAA, Carter, or any private schools because he "didn't think they would support it." TSSAA's Legislative Council approved the proposed "split" in modified form. CAJA 1814, 1819-20, 1822-23.

This very divisive "split" episode, which is addressed in BA's antitrust claim, provides context for TSSAA's regulatory enforcement proceeding against BA. When, just months after the "split," a public school official reported alleged recruiting violations against BA, Carter had just been

on the losing side of a major internal TSSAA power struggle. That he had not been invited to the "split" meeting and was unsupportive of the "split" proposal demonstrate his tenuous political standing when BA – the very school whose athletic success had brought about the "split" – was accused (wrongly, as it turned out) of intentionally violating RR by offering free football tickets to unenrolled students.

During its investigation, TSSAA learned that BA had not knowingly or intentionally violated RR. Carter conceded that BA had no intent to violate RR. CAJA 1848, 1830. The parties have so stipulated. CAJA 126 (¶40), 63 (¶91). When the investigation showed no intentional violation, Carter and TSSAA staff were in a political bind. Exonerating BA would be a hard sell to the Watson hard-liners. Thus, despite this information, TSSAA pursued enforcement against BA.

The Recruiting Rule: Its Application and Interpretation

RR prohibits the "use of undue influence on a student …, the parents or guardians of a student by any person connected, or not connected, with the school to secure or to retain a student for athletic purposes." "Undue influence" is defined as "exceeding what is appropriate or normal." 304 F. Supp.2d at 984. The terms "appropriate or normal" are not defined. 13 F. Supp.2d at 686.

The Spring Practice Letter (SPL). TSSAA cleared Ray Marley, a Grassland Middle School student, to lift weights at BA during 1996-97. 304 F. Supp.2d at 997 & n.14. Marley planned to matriculate at BA in fall 1997. Marley wished to attend spring football practice in May 1997, as permitted under TSSAA rules. 442 F.3d at 419 n.2.

"[T]o avoid singling out any students, particularly Ray Marley," BA's football coach Carlton Flatt sent the SPL in April 1997 "to all incoming ninth grade male students who had applied, been tested and admitted, and signed enrollment contracts with [BA]." 304 F. Supp.2d at 989.

One accepted student, who had not signed an enrollment contract, was not sent the SPL. 442 F.3d at 428.

The SPL was informational, setting forth dates for spring football practice and inviting students to attend if interested. The letter was followed by a telephone call to the parents of each student to reaffirm that participation in spring practice was entirely optional. Students who received the letters were entering high school and, therefore, had to change schools upon graduating from middle school.

The District Court found that the SPL and calls "caused no actual harm and did not reasonably threaten harm to students [or] parents" and "simply were harmless informational speech about a permitted athletic practice from a private school to all the parents of all the male students who had already applied, been tested and admitted, and signed enrollment contracts, students who had already decided to attend [BA]." The SPL and calls "did not 'single out' students since they went to all the families of all male students who had completed the enrollment process." 304 F. Supp.2d at 995, 442 F.3d at 428-29 (affirming).

With respect to the SPL and calls, the District Court, applying intermediate scrutiny, held that RR was "not narrowly tailored to further any of the three governmental interests[5] of the TSSAA as applied to Brentwood Academy."

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[5] The interests asserted by TSSAA initially were "(1) to keep high school athletics in their proper place subordinate to academics and (2) to protect student athletes from exploitation." At the second appeal, TSSAA "proffered an additional interest ... fostering a level playing field between the various member schools." 262 F.3d at 557. Governmental regulation of speech must serve a substantial interest that must be "actual," not merely "stated" or otherwise conjured up after the fact. *Edenfield v. Fane*, 507 U.S. 761, 768 (1993). That TSSAA "conceivably could have enacted" its regulatory restriction on speech for a particular reason is insufficient since this Court has not sustained speech restrictions "on the basis of hypothesized justifications." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 374 (2002). TSSAA has not established that "competitive equity" is an "actual" as distinct from a "stated" purpose, especially since it did not think to defend RR on that

The SPL and calls "are an example of 'due,' rather than 'undue,' influence, as testified by the parents of these students." 304 F. Supp.2d at 995. The Court of Appeals affirmed. 442 F.3d at 428.[6]

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ground at summary judgment in the District Court or in the first appeal. Under the circumstances, this Court "need not pursue that inquiry." *Republican Party v. White*, 536 U.S. 765, 778 (2002).

[6] There is a fundamental difference between the "additional interest" TSSAA now asserts – competitive equity – and its other two interests. As applied to speech restriction, competitive equity shifts the focus from the student's interest, which is the unit of analysis under the "exploitation" and "subordination" theories, to the collective interest of the schools in the association, CAJA 1685-86, thereby necessarily subordinating the interest of the student to that of the association (and, to some degree, commodifying the students themselves). *See* Factual Context, *supra*. This places the educational interests of the students in substantial tension with the interests of the association. It treats students as objects, as "mere creature[s] of the state," which *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), condemns. Such an approach turns the role of government – facilitating educational opportunities for youth – on its head, and disrespects the primacy of student/family choice. Addressing that tension, the District Court held that the "substantial government interest in informed choice trumps any governmental interest in controlling which schools or teams win athletic contests" because "[a]cademics are more important than athletics." 304 F. Supp.2d at 994. Since TSSAA asserts an interest in subordinating athletics to academics, it is hard-pressed analytically to take issue with that holding. The Court of Appeals agreed, holding that competitive equity is not a "substantial" governmental interest justifying a restraint on speech. 442 F.3d at 426-27. Non-threatening and non-coercive school-initiated, targeted communication with non-matriculated students "may influence the outcome" of a student's decision whether or not to attend a particular school. "[T]his would be its purpose." But TSSAA may not "restrict the speech of some [members] in order to enhance the relative voice of others." That is "wholly foreign to the First Amendment." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790-91 (1978). As the District Court stated at summary judgment, "TSSAA does not have a legitimate interest in preventing a school, public, private or parochial, from providing information in an effort to persuade potential students that the educational experience at that school is superior to that to be gained at another school." That is, "it is simply not the business of the State to

Summary Judgment Stage. Considerable interpretive commentary follows RR. 304 F. Supp.2d at 984-86. At summary judgment, violation of the commentary seemed to be a *per se* violation of RR. 13 F. Supp.2d at 686. Punishment of BA seemed unrelated to the content of its communications with students and parents and, according to TSSAA, was defensible under TPM theory because not content-based. *Id.* at 687-88.

In 2001, the Sixth Circuit accepted those assertions; as defined by the commentary, RR "prohibit[s] the coaches and those acting on their behalf from initiating the contact" with "prospective students." 262 F.3d at 553, 557. Based on the summary judgment record, it concluded that RR, "as defined by the questions, answers, and guidelines contained within the TSSAA Bylaws," *id.* at 552, was "regulatory action," *id.* at 558, addressing "secondary effects" unrelated to the content of the speech, *id.* at 553, and did not "ban[] the substantive content of any particular message." *Id.* at 552. Accordingly, that court held that the RR regulated the "manner" in which schools can communicate about their athletic programs, *id.*, and applied the intermediate scrutiny standard applicable to TPM regulations. *Id.* at 553-54.

BA sought review in this Court. No. 01-1117. TSSAA described the SPL as a form of "recruiting conduct" proscribable "regardless of the specific content of the message it uses to solicit minors" and sanctionable "[r]egardless of the specific content of any recruiter's message," or its "persuasive effect." BIO 13-14, 17. TSSAA characterized its enforcement of RR as "[s]tate regulation," which is "triggered by the event rather than the content of any speech during the event." TSSAA contended

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stifle competition among schools for students, whether those students are athletes, musical prodigies, or math geniuses. In the competition among schools for students, the First Amendment prohibits the State from favoring one side ... by suppressing the speech of the other .... TSSAA cannot control school choice through censorship." 13 F. Supp.2d at 689.

that its RR "must ... be viewed as a reasonable restriction on the time and manner of [BA's] solicitation of minors." BIO 15.

Trial Stage. At trial, TSSAA disavowed a content-neutral interpretation of the interpretive commentary as creating and defining a series of specific *per se* RR violations. TSSAA did not identify "secondary effects" unrelated to the content of speech toward which the regulation of speech was aimed. The District Court found this as a fact. 304 F. Supp.2d at 996 n.12.

The evidence at trial demonstrated that, in administering RR, TSSAA focused, on a case-by-case basis, on the content of the communication in determining whether it constituted "undue influence." TSSAA acknowledged that the content of the punished speech and its impact on the recipients of the SPL and calls were critical ingredients underlying TSSAA's discipline of BA. The District Court found: "[T]he preponderance of the credible evidence at trial is that the substantive 'content' of the [SPL] and calls mattered and was a significant factor in the TSSAA's decision that the letter and calls constituted 'undue influence' and violated the Recruiting Rule." *Id.* at 991 n.4; *see also id.* at 996 n.12 ("[T]he application of the Recruiting Rule to [BA] in this case is with reference to the content of the speech and the impact of the speech").[7]

The interpretive commentary is not a set of content-neutral *per se* rules but constitutes guidelines that Carter and TSSAA have discretion to disregard in applying RR's "undue influence" standard. CAJA 740, 817, 846-55, 1009-10. Analysis under RR is a standardless, *ad hoc* totality-of-

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[7] At trial, TSSAA distinguished, based on content, the SPL and a comparable "Warrior" letter from another coach at another school (Riverdale). TSSAA deemed the SPL "undue influence" but not the Warrior letter. *Id.* at 991; CAJA 814-25. See Appendix A.

the-circumstances approach.[8] CAJA 1702, 817. There are "not violations of questions" but only of the "undue influence" standard of RR; determination of a violation requires Carter to "put that all into the context of what has occurred," CAJA 851, to "determine whether all the factors that are there" constitute "undue influence." CAJA 849.

Carter stated that "[w]e don't have an initial contact rule," CAJA 740, and "[w]e don't have a no coach contact rule." CAJA 850. Initial contact by a coach is not a violation; to determine what violates RR, even in the face of initial contact, "you would have to take all of the whole thing into what's turning around, what's taking place. You got to take all the information and put it together ...." CAJA 848.

Carter distinguished the considerable discretion he exercised under RR from his non-discretionary role in interpreting other rules. CAJA 855. For the RR, the commentary is not binding. "[T]he questions and answers [*i.e.*, the interpretive commentary] don't matter ..., it's not the rule." The RR itself "is all that really counts, everything else underneath it, the interpretive commentary is discretionary and it depends upon the totality-of-circumstances." CAJA 1009-10, 1115, 1069; Tr. 1053.

The District Court found that "[i]nclusion of the interpretive commentary does not save the Recruiting Rule;"

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[8] According to TSSAA, member schools should "[p]ick up the telephone and call" Mr. Carter for a non-binding interpretation of whether particular speech is permitted under the "undue influence" rule. CAJA 861, 810, 1069. Such standardless discretion is routinely invalidated in First Amendment cases. A "regulatory program aimed at the prevention of undue influence" risks the "danger of censorship through selective enforcement of broad prohibitions." *In re Primus*, 436 U.S. 412, 432 (1978). Adequate standards are necessary in the First Amendment context for "effective judicial review" of government's regulatory conduct. *Thomas v. Chicago Park Dist.*, 535 U.S. 316, 323 (2002). *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 133 & n.10 (1992); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 & n.7 (1975); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151-53 (1969).

the "interpretive commentary to the Recruiting Rule is not a binding interpretation of the Recruiting Rule, and ... the Executive Director and the Board of Control have the discretion to disregard the interpretive commentary," and they "have done so." 304 F. Supp.2d at 986, 992, 995 & n.8. The Court of Appeals affirmed this finding. 442 F.3d at 416-17, 428. In sum, "TSSAA penalized [BA] for the substantive 'content' of the [SPL] and calls and the message conveyed." 304 F. Supp.2d at 991 n.4.

With its TPM defense in analytical tatters on all fronts, TSSAA has redirected the analytical focus – away from the content-neutral vs. content-based issue within a regulatory framework – to the claim that, contrary to its earlier contention, the regulatory framework and the attendant TPM analysis do not apply at all.

REASONS FOR DENYING CERTIORARI

The Petition reads like a game of pin-the-tail-on-the-constitutional-donkey, blindly trying to find some doctrine somewhere whose standards TSSAA can possibly meet, even if there is no real applicability to the circumstances.

TSSAA has never been able to explain why it disciplined BA for a harmless communication to non-matriculated students and their parents about an activity – spring football practice – that the rules allowed the students to attend. Mr. Carter had concerns about the number of students participating in spring practice, believing the spring practice rule had "outlived its purpose." CAJA 703. In earlier years, only one or two students had participated at BA. After the SPL, twelve students participated. CAJA 1844. Faced with a situation of which he disapproved, but which was permissible under existing rules, Carter punished the speech that resulted in the disapproved but legal outcome – the increased spring practice participation. Regulatory conduct barring speech about legal conduct so clearly

violates core First Amendment principles that the federal government has declined to enforce or defend such restrictions. *New York Bar Ass'n v. Reno*, 999 F. Supp. 710 (N.D.N.Y. 1998).

To the extent that allowing non-matriculated students to participate in spring practice is educationally unsound, TSSAA had – and has now exercised (442 F.3d at 419 n.2) – the authority to ban the conduct. Incoming, but not-yet-matriculated, students may no longer participate in spring practice. CAJA 703. Thus, the problem that precipitated this proceeding will not recur. That is the appropriate resolution, not punishing speech that invites participation in the activity. One might think that, having changed the policy, TSSAA would no longer pursue the matter. No broad forward-looking injunction has been issued, 442 F.3d at 428 n.11, 443-44, only case-specific retrospective relief – critical vindication for BA but of less import to TSSAA. Instead, TSSAA has fought a scorched-earth battle to suppress BA's harmless speech that informed students of an authorized athletic opportunity. As the District Court held, TSSAA has applied RR to "what is essentially post-recruiting activity," which is "especially troublesome." 304 F. Supp.2d at 996.

TSSAA'S CHALLENGED ACTION WAS REGULATORY

The State-Action Holding. TSSAA's Constitution states as its purpose "to stimulate and regulate athletic relations of the secondary schools of Tennessee." 13 F. Supp.2d at 679. This Court addressed the following issue in 2001: "[W]hether a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools may be regarded as engaging in state action when it enforces a rule against a member school," a "private parochial high school." 531 U.S. at 290, 293. The Court's answer: "[T]he association's regulatory activity ... should be treated as state action." *Id.* at 291. It

was this regulatory function, exercised "in lieu of the State Board of Education's exercise of its own authority," *id.*, that made TSSAA a state actor. TSSAA had been designated and recognized as the state's "regulator" of interscholastic athletics. *Id.* at 292-93. TSSAA's conduct would not be state action if it were merely providing services. *Id.* at 299.

This Court understood TSSAA to be acting in a regulatory capacity in enforcing RR against BA and sanctioning BA for a putative violation. It noted that this case "responds to a 1997 regulatory enforcement proceeding brought against [BA], a private parochial high school member of [TSSAA]." *Id.* at 293.

TSSAA's regulatory conduct vis-à-vis BA is subject to conventional First Amendment scrutiny of governmental regulatory conduct. *See Marsh v. Alabama*, 326 U.S. 501, 503-05, 507 (1946) (holding conventional First Amendment principles from licensing cases applied to solicitation in company-owned town (a state actor)); *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 320 (1968) (First Amendment protections co-extensive with those of municipalities apply to shopping center) (state action holding overruled, *Hudgens v. NLRB*, 424 U.S. 507 (1976)).

First Amendment Analysis. In the Sixth Circuit, TSSAA asserted that conventional First Amendment analysis "appl[ies] only to a state's exercise of sovereign police power over an unwilling citizen." TSSAA Response Brief at 5. Its Petition repeats this assertion. As the Sixth Circuit held, the cases do not sustain it. 442 F.3d at 422-24. Rather, conventional First Amendment principles apply to TSSAA's regulatory conduct.

To qualify as "regulation," governmental suppression of speech need not stem from sovereign status. It can come from informal activities amounting to "informal censorship." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 69 (1963). In *Bantam Books*, a state Commission had no prosecutorial

authority, only authority "to educate the public concerning any book" tending to "corrupt[] ... youth," *Id.* at 59, 61-62.

This Court noted the importance of procedures to protect speech against curtailment and the absence of such procedures surrounding the Commission. The Commission argued that conventional First Amendment principles did not apply because the Commission did "not regulate or suppress" speech but "simply exhorts" and advises booksellers. That contention was "premised on the Commission's want of power to apply formal legal sanctions." That is, the Commission asserted that it was not exercising sovereign power to suppress speech.

This Court found that position "untenable." *Id.* at 66. The Commission's conduct, a form of blacklisting, in effect stopped the circulation of publications and was designed to achieve that goal. The Commission's conduct was "a form of regulation that creates hazards to protected freedoms." The procedures fell "far short of the constitutional requirements of governmental regulation." *Id.* at 70, 71. That the Commission exercised no formal sovereign functions was immaterial.

Similarly, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), this Court applied conventional regulatory doctrine regarding "public forums" to proprietary operation of a municipal theatre. The question was whether a city could refuse to lease a city-operated theatre for showing "Hair."

Conrad applied First Amendment principles from the licensing cases to the city's decision not to contract with "Hair" in the municipally-operated theatre. The city's decision not to contract was "indistinguishable in its censoring effect from the official actions" in the licensing cases. "[R]estraints" on speech take a "variety of forms." *Id.* at 552. The critical First Amendment issue is the power of government officials to restrain speech, whether through exercise of sovereign or proprietary (contractual) authority.

The contract was "in effect, a license or a permit" with approval based on the "exercise of judgment." *Id.* at 554 & n.7. *Conrad* accordingly applied conventional First Amendment "prior restraint" doctrine, although derived from cases involving restraints "embedded in the licensing system itself." *Id.* at 553. The contractual form and its non-sovereign source did not save the restraint from being considered a "prior restraint" on speech subject to First Amendment principles applicable to sovereignty-based licensing cases, *id.* at 555; the "elements of prior restraint identified in [the licensing cases] were clearly present in the system by which the Chattanooga board regulated the use of its theatres." *Id.* at 554. The existence of excessive discretion by public officials in contracting triggered the same procedural requirements as in sovereignty-based licensing. *Id.* at 554 & n.7; *accord*, *Forsyth County*, 505 U.S. at 131; *Thomas*, 535 U.S. at 321; 442 F.3d at 423-24.

Ibanez v. Florida Bd. of Accountancy, 512 U.S. 136 (1994), also demonstrates the non-existence of TSSAA's asserted doctrinal principle. Ibanez practiced law and also was a licensed Certified Public Accountant (CPA). She could perform accounting functions without a license. *Id.* at 140 n.6. With one exception, "activities performed by CPAs can lawfully be performed by non-CPAs." *Id.* at 139 n.3.

Ibanez voluntarily subjected herself to the Board of Accountancy, which disciplined her for using CPA and CFP (Certified Financial Planner) designations. Since Ibanez did not need approval to practice law or accounting, the Board had no sovereign authority over her. It exercised a credentialing or certification function, but had no authority to require Ibanez to stop practicing accounting – only to stop using certain designations.

Although the Board exercised non-sovereign certification authority, this Court applied traditional commercial speech doctrine from the licensing cases. Ibanez voluntarily submitted to the Board's regulatory jurisdiction

to receive its imprimatur; BA voluntarily submits to TSSAA's regulatory authority to participate effectively in organized interscholastic athletics. Just as the full panoply of commercial speech protections applied in *Ibanez* to a disciplinary proceeding in the non-sovereign regulatory context, so does the full panoply of non-commercial speech protections apply to TSSAA's regulatory disciplinary proceeding against BA.

In *Board of Regents v. Southworth*, 529 U.S. 217 (2000), the question was whether a public university may require its students to pay an activity fee that supports extracurricular speech. Students voluntarily (contractually) enroll in a public university; nevertheless, the Court applied conventional First Amendment principles to assure that a standardless referendum procedure did not undermine traditional First Amendment protections – that "[a]ccess to a public forum ... not depend upon majoritarian consent." The issue was the university's treatment of registered student organizations, a contractual setting; yet, traditional First Amendment principles were "controlling here." *Id.* at 235.

In *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 834-35 (1995), a public university's regulation authorized payment for printing costs of student publications. The regulation withheld payment from plaintiffs because their student paper promoted belief "about a deity." The relationship between the university and its students was contractual, yet this Court described the guideline as a regulation, expressing concern that it "effects a sweeping restriction on student thought and student inquiry." "Vital First Amendment speech principles" were at stake, including giving government broad discretionary authority to classify speech based on content. *Id.* at 835. The Court invalidated the regulation, applying conventional First Amendment principles; the contractual, non-sovereign status of the university's authority was immaterial, since "[v]ital First Amendment speech principles" can arise irrespective of

the formal nature of authority exercised. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (statutory restriction implemented by contract considered regulatory restriction on speech and analyzed as such, "lest the First Amendment be reduced to a simple semantic exercise").

In *Widmar v. Vincent*, 454 U.S. 263 (1981), the question was whether a state university, which made its facilities generally available to registered student groups, may close its facilities to a registered student group desiring to use the facilities for religious worship and discussion. The "pertinent regulations" prohibited use of university facilities for religious worship or teaching. *Id.* at 264-65 & n.3.

The regulation was a content-based exclusion of speech that had to satisfy strict scrutiny, "the standard of review appropriate to content-based exclusions." *Id.* at 270 & n.7. The university's authority stemmed from its ownership of facilities, not "sovereign" power. Its relationship with students was contractual. The regulation did not involve the use of "sovereign police power over an unwilling citizen." Students voluntarily subjected themselves to the authority (and benefits) of the university via enrollment contracts; the university's content-based restriction of speech in the allocation of university facilities was subjected to the generally applicable "standard of review appropriate to content-based exclusions." *Id.* at 270. The university could impose TPM restrictions, subject to generally applicable TPM standards. *Id.* at 276. But when a public university adopts content-based regulations of speech affecting its students, it must justify those restrictions "under applicable constitutional standards" for content-based regulation of speech.

In *Keller v. State Bar*, 496 U.S. 1, 4, 13-14 (1990), state law compelled lawyers to join and pay dues to an integrated bar. In *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1976), a collective bargaining contract mandated payment of union dues by public employees. This Court

upheld both mandatory payments but held the bar could only spend mandated dues on matters germane to regulation of the legal profession, and the union could only spend mandated dues on matters germane to collective bargaining. Contributions compelled by government for political purposes infringe First Amendment rights, whether compulsion derives from positive law (*Keller*) or contract (*Abood*). The First Amendment principles are identical. *See First Nat'l Bank*, 435 U.S. at 795 (compelled financial support of political activity violates First Amendment whether by "state law" or by union contract); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 302 n.9 (1986).

In sum, there is no basis for TSSAA's claim that, in the regulatory context, First Amendment protections are limited to matters of "public concern." Such a rule would give unprecedented and far-reaching censorious authority to government as regulator. Indeed, a core First Amendment principle is that private speakers get to choose their topic, and government regulation of the speaker's topic is subject to searching scrutiny. *First Nat'l Bank*, 435 U.S. at 785 (government may not dictate "the subjects about which persons may speak").

The entire "contract" discussion is smoke and mirrors, more akin to the jurisprudence of Houdini than that of Holmes.[9] A party can knowingly and intentionally waive a constitutional right, but no waiver exists here (442 F.3d at 424-25; pages 2-3, *supra*);[10] and, if that were the argument,

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[9] *Cf. First Nat'l Bank*, 435 U.S. at 778 n.14 (rejecting analogous claim that, as "creatures of the state," corporations "have only those rights granted to them" and that states "are free to define the rights of their creatures without constitutional limit," characterizing such claims as "an extreme position" because it would allow states to deny corporations "the protection of all constitutional guarantees").

[10] The waiver argument also overlooks the critical interests of the recipients of BA's communication. *Id.* at 776, 791 n.31 (First Amendment "protects interests broader than those of the party seeking

the existence of waiver in a particular case is case-specific and hardly certworthy. As the foregoing cases establish, merely agreeing to subject oneself to government's non-sovereign regulatory authority does not constitute waiver.[11] This emperor has no clothes. 442 F.3d at 421-24.[12]

THE TIME, PLACE, AND MANNER DEFENSE

Conventional First Amendment analysis allows for defense of an incidental restraint on speech based on TPM. In remanding for trial, the Sixth Circuit gave TSSAA an opportunity to defend its punishment of BA's non-commercial speech on a TPM theory. The burden of

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their vindication" and "rejects the 'highly paternalistic' approach of ... restrict[ing] what the people may hear"). 13 F. Supp.2d at 690 n.19.

[11] *Cf. Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 456-57 (1988) (rejecting claim that a party is forbidden to challenge government action because it "deriv[es] some benefit from it").

[12] There is no reason to vacate and remand in light of *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006), or *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006). Pet. 20. This case has been to the Sixth Circuit three times already and has been ongoing since 1997. TSSAA has had its chance to prevail over and over; it has embraced and then disavowed both facts and theory. Vacating and remanding would add expense and needlessly prolong resolution and to no gain. *Garcetti* deals with First Amendment protection of employees, not restraints on speech involving government as regulator. Unlike the proceeding herein, in which speech is punished, *Rumsfeld* did not deal with "law schools' right to speak," 126 S.Ct. at 1311, but with speech "plainly incidental to the ... regulation of conduct," *id.* at 1308, and to expressive conduct that is "not inherently expressive." *Id.* at 1310. Further, *Rumsfeld* analyzed the issues under traditional First Amendment doctrine, breaking no new ground. *Id.* at 1307. The Sixth Circuit released its decision 16 months after oral argument, after *Rumsfeld* was decided. The panel almost surely was aware of *Rumsfeld* and properly concluded that its analysis was not relevant to the very different First Amendment issues presented herein. Gratuitously vacating and remanding is not useful and is potentially wasteful.

justification rested with TSSAA. 262 F.3d at 554. TSSAA was unable to establish the elements of a TPM defense.[13]

TSSAA had an opportunity to justify, under TPM doctrine, its restraint on speech in the context of what this Court has described as TSSAA's "regulatory enforcement proceeding" against BA. 531 U.S. at 293. The Sixth Circuit found two interests to be "substantial" – subordination of athletics to academics and exploitation. The asserted interest in competitive equity was not deemed substantial. See note 6, *supra*. Since TSSAA's regulatory enforcement was not narrowly tailored to any substantial interest, its TPM defense failed. Because of the terms of the 2001 decision to remand, neither the District Court at trial nor the Sixth Circuit found it necessary to address or rely on the other TPM elements. But, based on the evidence, the District Court did find that TSSAA's regulatory action was neither content-neutral nor focused on "secondary effects." 304 F. Supp.2d at 991 n.4, 996 n.12. And the Sixth Circuit found "that the interpretive commentary is discretionary" and enforcement of RR depends on the standardless "totality of the circumstances." 442 F.3d at 416-17. So, lack of narrow tailoring did not stand alone; other elements of a TPM defense are lacking.

When the RR infringes on speech, the First Amendment requires TSSAA to implement a "process" that provides for a "careful calculation of the speech interests involved." Even when regulating other things, government must consider the impact of the regulation on speech. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 562 (2001). That did not occur in the adoption or enforcement of RR.

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[13] To prevail, TSSAA had to satisfy five elements: (i) the regulation must serve a "significant" (or "substantial") governmental interest; (ii) the regulation is narrowly tailored to achieve that interest; (iii) TSSAA must have "adequate standards to guide [TSSAA's] decision and render it subject to effective judicial review;" (iv) the regulatory scheme "must not be based on the content of the message;" and (v) permissible regulation of the secondary effect of speech "must leave open ample alternatives for communication." *Thomas*, 534 U.S. at 323 & n.3.

At trial, it became evident that TSSAA has never recognized the special solicitude accorded to governmental regulation of First-Amendment-protected speech. *See* note 3, *supra*. TSSAA and its witnesses saw speech and conduct as indistinguishable for purposes of the exercise of TSSAA's regulatory authority. TSSAA gave no consideration to RR's application to First-Amendment-protected speech or to non-speech alternatives. Mr. Carter admitted that TSSAA had not "at any time in the last ten years ever considered alternatives to restricting speech in looking at the recruiting rule" and had "given no consideration whatsoever to how can we tailor the recruiting rule to meet the requirements of the First Amendment." CAJA 1016-18.

In sum, government's ability to restrict speech is more circumscribed than its ability to regulate conduct. *Hurley*, 515 U.S. at 579. The speech punished in this case is non-commercial in character, 262 F.3d at 555; TSSAA's Petition does not contest that. Even if, as TSSAA asserts, BA's speech were solicitation, government cannot discipline non-commercial solicitation "without proof of actual wrongdoing that the State constitutionally may proscribe." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 n.20 (1978). In *Primus*, which involved discipline for "undue influence" in the context of non-commercial speech, the Court found that no "undue influence, overreaching, misrepresentation, or invasion of privacy actually occurred." 436 U.S. at 434-35. The Court analyzed the specific context and the specific speech in question to conclude that, in the absence of harm, government could not "justify proscription of the activity of appellant." *Id.* at 436.

The findings in this case are similar; the lower courts have found the SPL and calls to be informative, not harmful, with no indication of exploitation "in theory or fact." 442 F.3d at 428. TSSAA applies the "undue influence" RR principle on an *ad hoc*, case-by-case basis – in this case to pure speech, not expressive conduct. As the facts have

developed, RR does not contemplate a broad prophylactic or categorical rule prohibiting all school-initiated, targeted contact. So, TSSAA's assertion that the rule should be viewed in the abstract, not as applied in specific situations (Pet. 18), rings peculiarly hollow.[14] Since there is no "coach contact" or "initial contact" *per se* categorical rule, but only an *ad hoc* case-specific "undue influence" rule applied to specific speech or conduct, TSSAA's claim that the specific application of the rule need not be justified is unwarranted. Since there is no categorical rule, there is no way to evaluate the application of the rule except by examining its application in specific cases and contexts. *Primus* makes this clear. Otherwise, government would be handed a blank check to restrict speech, without effective judicial review.[15]

Even a categorical rule must be justified in an as-applied TPM context by reference to the specifics of the circumstances. In upholding a ban on posting signs on public property, this Court distinguished a case that invalidated a ban on handbilling; the sign posting ban dealt directly with the "substantive evil – visual blight" that is "created by the medium of expression itself" and thereby "responds precisely to the substantive problem" and "curtails no more speech than is necessary to accomplish its purpose." That is, the signs themselves "constitute[d] visual clutter and blight," and the ban "did no more than eliminate the exact source of the evil it sought to remedy." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808-10

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[14] TSSAA's cases (Pet. 19) involve the application of categorical rules. The "undue influence" standard is inherently *ad hoc*, applied case by case. Further, a TPM defense cannot be established here because the undue influence standard turns on the content of the communication and its impact on the listener. 304 F. Supp.2d at 991 & n.4, 996 n.12.

[15] Even a broad prophylactic "undue influence" rule against "all solicitation" cannot apply to non-commercial speech, where "a State must regulate with significantly greater precision." *Primus*, 436 U.S. at 437-38.

(1984). This is not true of this case, since, as the District Court found, the punished speech is "consistent with ... the TSSAA's legitimate governmental interests," "caused no actual harm and did not reasonably threaten harm to students, parents, or any legitimate governmental interests," and was "not intrinsically coercive, threatening, harassing, or otherwise harmful." 304 F. Supp.2d at 995-97.

As a general matter, then, "if the Government could achieve its interest in a manner that does not restrict speech, or that restricts less speech, the Government must do so.... [R]egulating speech must be a last – not first – resort." *Thompson*, 535 U.S. at 373. But speech restriction is the only resort TSSAA has checked into.

OTHER MATTERS

No Circuit Split Exists. TSSAA asserts that a split in circuits exists on the issues raised in this matter. This is incorrect. TSSAA's cases either involve express, negotiated fact-specific waivers or non-regulatory conduct. None of the cases allegedly establishing a circuit split involves a claim that regulatory conduct of a governmental entity receives special First Amendment non-scrutiny. Pet. 20-22. BA is aware of only one court of appeals case to have confronted the First Amendment issue raised herein, and that decision did not create a conflict. *Holy Cross College, Inc. v. LHSAA*, 632 F.2d 1287 (5th Cir. 1980). *Holy Cross* involved a First Amendment challenge to application of the "undue influence" standard in the context of a high school athletic association's RR. The Fifth Circuit declined to dismiss since the allegations "implicate[d] the fundamental right of free speech guaranteed by the first amendment." *Id.* at 1289.[16]

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[16] There is one district court case that, as an alternative analysis, would apply TSSAA's approach to a high school athletic association's RR. *Rottmann v. PIAA*, 349 F. Supp.2d 922 (W.D. Pa. 2004).

This Court Should Not Revisit State Action. TSSAA throws a Hail Mary pass, inviting this Court to relieve it of its obligations as a state actor. The Court should RSVP no.

TSSAA asserts (Pet. 27) that this Court did not take into account the "particular state *action*" involved, only TSSAA's status. This is erroneous, bordering on silly. It is the regulatory function that TSSAA performs, entwined with government, that resulted in its being found a state actor. This Court found TSSAA a "surrogate association" designated and recognized by the state as "regulator of interscholastic athletics." 531 U.S. at 292-93, 300. If only a service provider – "a mere buyer[] of contract services" – TSSAA would not be a state actor. *Id.* at 299. TSSAA willfully ignores the critical regulatory function it performs, "regulat[ing] in lieu of the State Board of Education's exercise of its own authority." This Court held that TSSAA's "regulatory activity" constituted state action. *Id.* at 291. The Sixth Circuit had no trouble recognizing the analytical significance of the regulatory character of TSSAA's conduct for purposes of the First Amendment analysis in this case.

Agostini v. Felton, 521 U.S. 203 (1997), is not on point. *Agostini* overturned a prior decision by this Court in the very same case because the original decision was "no longer good law" in light of this Court's "subsequent ... decisions." *Id.* at 208-09. The earlier decision had resulted in a "prospective injunction" that still barred New York City from sending public school teachers into parochial schools to provide remedial education to disadvantaged children. In *Agostini*, this Court permitted relief from the ongoing effect of the prospective injunction under FRCP 60(b)(5).

No subsequent decision of this Court calls into question its holding in this case. No prospective injunction was entered by the Sixth Circuit, 442 F.3d at 428 n.11, 444. TSSAA has not followed the procedure mapped out in Rule 60(b), as was done in *Agostini*, and indeed does not even

mention Rule 60(b). The lack of prospective relief in this case makes *Agostini*'s rationale and procedure inapplicable. 521 U.S. at 237-40. The unusual *Agostini* procedure is only appropriate to "*recogniz[e]* changes in law" not "as a vehicle for *effecting* them" (*id.* at 238) – what TSSAA seeks.[17]

Since no subsequent change of law has taken place and no prospective injunction analogous to *Agostini* exists, one is left to the natural inference that TSSAA is appealing to the two newly appointed Justices to reconsider a recent precedent in the context of that very case. The cautionary comment of Justice Stewart in this regard is worth repeating. He expressed "a word of concern" about overruling recent precedent when the "only perceivable change that has occurred" since the recent precedent at issue was "in the makeup of this Court." A "basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 634-36 (1974) (dissent). This Court should credit Justice Stewart's words of caution by not revisiting its state action analysis.

Procedural Due Process. TSSAA half-heartedly seeks review on the procedural due process issue but in its Petition only succeeds in explaining why the case reflects a particular application of fairly plain-vanilla doctrine.

The District Court found that allegations surrounding Bart King had been discussed and relied on by TSSAA in its *ex parte* deliberations about sanctioning BA, that BA had no opportunity to respond to this evidence, and that BA had been "misled" by TSSAA about the relevance of these

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[17] *Agostini* distinguished a change in law that has already occurred from the "views of five Justices that the case should be reconsidered or overruled," which "cannot be said to have effected a change" in the law warranting overruling a decision in the same case. *Id.* at 217-18.

allegations. 304 F. Supp.2d at 1004 & n.29. The Sixth Circuit upheld these factual findings. 442 F.3d at 436. TSSAA cavalierly avers that the "district court wrongly credited a statement that TSSAA considered *ex parte* evidence of recruiting violations" by Bart King. Pet. 26. So, TSSAA seeks review of fact-finding error. Hardly certworthy, even if the evidentiary issues had been preserved.

On the law, the Sixth Circuit's decision breaks no new doctrinal ground. It held that "a school must be informed of all the issues relied on by an athletic association levying penalties against the school and be given a chance to respond to those issues before penalties are imposed." Due process assured BA "notice of the evidence relied upon" in penalizing it and an opportunity to respond timely to that evidence. 442 F.3d at 437-38.[18] TSSAA procedures provided no assurance that its decision would be based on the "evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The result implicated venerable principles regarding the importance of an opportunity to cross-examine. *See id.* at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (PDP requires party challenging his detainee status to receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions"); 442 F.3d at 434, 436-37.

CONCLUSION

For the foregoing reasons, TSSAA's petition for certiorari should be denied.

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[18] The Sixth Circuit rejected BA's claim that it had a right to a neutral, impartial decisionmaker. 442 F.3d at 434.

Respectfully submitted,

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APPENDIX

BRENTWOOD ACADEMY
219 Granny White Pike
Brentwood, Tennessee 37027
(615) 377-3632
fax: (615) 377-3709

Athletic Director: Carlton Flatt
Asst. Athletic Director: Buddy Alexander

April 23, 1997

Having officially enrolled at Brentwood Academy, the TSSAA allows you to participate in spring football practice. If you are not currently involved in a sport at your school, we would like to invite you to practice with your new team. Equipment will be given out April 30th at 3:30 downstairs in the locker room.

Spring practice will begin May 1, 1997 and conclude on May 14, 1997. Practice begins at 3:20 and will be finished by 4:45. Due to the inconvenience to your parents, please do not feel that you must attend every practice. However, I do feel that getting involved as soon as possible would definitely be to your advantage.

In the near future, you will receive a letter outlining our summer workout program. If you have any questions, please call me at school 373-0611 x 119, or at home 373-0475. We are certainly glad that you decided to become an ***Eagle***.

Your Coach,
Carlton Flatt

July 6, 1995

WARRIOR!

I would like to take this opportunity to **WELCOME** you to the 1995 Riverdale Warrior football team.

We are looking forward to the upcoming season with great enthusiasm and high expectations. Our opening game with Smyrna is a little over eight weeks away and we must be totally committed to the task ahead of us.

The Riverdale High School motto is "A COMMITMENT TO EXCELLENCE" and that is what we will strive for this season. With your commitment and dedication we will achieve our goal of being the "1995 REGION 4AAAAA CHAMPIONS" – on the way to "STATE CHAMPIONS".

On Monday, July 24th, Dr. O. Tom Johns and staff will physicals, free of charge, from 5:00 p.m. to 8:00 p.m. at Riverdale. Please complete the enclosed form and bring it with you on the day of the physicals. Report directly to the Riverdale High School football locker room.

ALL players will report to practice on Tuesday, July 25, 1995 at 4:00-8:00 p.m.

SEE YOU SOON!

Coach Gary Rankin

1. **Monday, July 24, 1995 physicals 5:00 p.m. – 8:00 p.m.**